

CRUZ JUAREZ DEBAEZA)	
Claimant)	
VS.)	
)	
SUPER 8 MOTEL)	Docket No. 183,947
Respondent)	
AND)	
)	
ALLIED MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

The Appeals Board considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant asked the Appeals Board to review the single issue of nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The Administrative Law Judge found claimant's permanent partial general disability benefits were limited to the stipulated functional impairment rating of 7.5 percent. The Appeals Board finds the Award of the Administrative Law Judge should be modified to provide claimant with permanent partial general disability benefits of 66.67 percent based on work disability from the date of her work-related accident, August 15, 1993, through the date of the regular hearing, February 29, 1996. At the time of the regular hearing, respondent offered claimant a job within her permanent work restrictions at a comparable wage. Accordingly, subsequent to the date of the regular hearing the claimant is limited to permanent partial disability benefits based on permanent functional impairment of 7.5 percent. See K.S.A. 44-510e.

Claimant injured her low back while performing housekeeping duties for the respondent on August 15, 1993. Respondent voluntarily provided medical treatment with David Edwards, M.D., who then referred claimant to Patrick J. Cindrich, M.D., a neurosurgeon in Amarillo, Texas. Dr. Cindrich, after diagnostic testing and treatment, determined claimant was not a surgical candidate. He referred claimant to Grace Stringfellow, M.D., board certified in physical medicine and rehabilitation, who provided conservative treatment from October 18, 1994, through December 20, 1994. After a functional capacity evaluation of claimant was completed, Dr. Stringfellow determined claimant had reached maximum medical improvement on December 20, 1994. In accordance with the AMA Guides, Third Edition, Revised, Dr. Stringfellow opined claimant had a 10 percent permanent functional impairment of the whole body as a result of her low back injury. The doctor placed permanent work restrictions on claimant of no lifting over 15 to 20 pounds and limited her from repetitive bending, twisting, crouching, or kneeling.

Dr. Stringfellow was presented a list of major work tasks which claimant had performed in jobs she had over the last 15 years. Dr. Stringfellow opined that claimant could not perform two of the work tasks because of her current work restrictions. Two other work tasks, putting on bedding and taking off bedding, Dr. Stringfellow testified claimant would not be able to perform if she had to repetitively bend and twist to do those jobs. Claimant testified that in order for her to perform the work tasks of making beds, vacuuming, and cleaning one had to repetitively and frequently bend and twist her back.

Respondent had claimant examined and evaluated on one occasion by C. Reiff Brown, M.D., an orthopedic surgeon in Great Bend, Kansas, on March 22, 1994. Dr. Brown diagnosed claimant with early degenerative disk disease at L5-S1 with mild bulging evident only on the MRI scan as early degenerative desiccation. Dr. Brown's assessment of claimant's whole body permanent functional impairment was 5 percent due to her low back injury. Dr. Brown based his opinion on the AMA Guides, Third Edition, Revised. The doctor restricted claimant from lifting over 50 pounds occasionally and 30 pounds frequently with proper body mechanics. He was asked a hypothetical question as to whether claimant could perform motel cleaning which was classified as medium work involving 50 pounds maximum lift and 25 pounds frequent lift. Dr. Brown opined that claimant could perform that type of work because it was within claimant's permanent restrictions. The doctor was not asked to express an opinion on claimant's current ability to perform her previous work tasks taking into consideration her current permanent restrictions.

Claimant testified at regular hearing on February 29, 1996, that she was not employed and had not been employed since her release by Dr. Stringfellow in December 1994. She testified the reason she was not employed was because of continuing problems resulting from her low back injury. Respondent argued that the Administrative Law Judge's Award limiting claimant to permanent partial disability benefits based on permanent functional impairment was correct and should be affirmed because respondent offered claimant a job at a comparable wage within her restrictions in June 1994 and she refused that job.

Claimant agrees with the portion of the Administrative Law Judge's decision that found the first time the respondent offered the claimant a job within her permanent work restrictions was at the regular hearing held on February 29, 1996. However, claimant argued that from the date of her accident, August 15, 1993, until the time she was offered a job within her permanent restrictions, February 29, 1996, she was eligible for work disability. Thereafter, the claimant would be limited to her functional disability. The Appeals Board agrees with claimant's arguments. The job respondent offered claimant in June 1994 was based on the permanent restrictions imposed by Dr. Brown who saw the claimant for examination and evaluation at the request of the respondent on one occasion. The Appeals Board finds the work restrictions placed on the claimant by her treating physician, Dr. Stringfellow, are the more credible restrictions. The only job offer the respondent made to the claimant within Dr. Stringfellow's restrictions was made February 29, 1996. Accordingly, the claimant was eligible for permanent partial disability benefits based on work disability from the date of her accident, August 15, 1993, until February 29, 1996.

For an accident with a date after July 1, 1993, permanent partial general body disability based on work disability is determined according to the "new act" provisions of K.S.A. 44-510e(a) which provide in part as follows:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the

physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.”

The first component of the work disability test is the physician’s opinion of the loss of the employee’s ability to perform work tasks that the claimant performed during the fifteen years preceding the accident. In this case, the only physician that testified to work tasks loss was claimant’s treating physician, Dr. Stringfellow. Claimant’s work history for the work tasks analysis only encompassed a period from October 1989 through September 27, 1994, some five years instead of 15 years. The Appeals Board finds from Dr. Stringfellow’s testimony and claimant’s testimony, post-injury, claimant could not perform four of the twelve work tasks she performed during her work history preceding the accident. Accordingly, the Appeals Board finds that the claimant, as a result of her work-related injury, has lost 33.33 percent of her ability to perform work tasks.

The second component of the “new act” work disability test is the wage loss. The procedure to follow in determining wage loss is specifically set forth as “the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.” K.S.A. 44-510e(a). The claimant testified that she was not working at the time of the regular hearing and had not worked since the date of her injury. Accordingly, the Appeals Board finds claimant’s wage loss component of the work disability test is 100 percent.

The wage loss component is required pursuant to K.S.A. 44-510e(a) to be averaged together with the work tasks loss component. Averaging the two components in this case, the Appeals Board finds claimant is entitled to permanent partial disability benefits based on a 66.67 percent work disability from August 15, 1993, claimant’s date of accident, through February 29, 1996, the date claimant was offered a job within her work restrictions at a comparable wage. Thereafter, the Appeals Board finds that the claimant is entitled to permanent partial disability benefits based on her functional impairment of 7.5 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated May 9, 1996, should be, and is hereby modified and an award is entered as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Cruz Juarez Debaeza, and against the respondent, Super 8 Motel, and its insurance carrier, Allied

Mutual Insurance Company, for an accidental injury sustained on August 15, 1993, and based upon an average weekly wage of \$135.02.

Claimant is entitled to 77 weeks of temporary total disability at the rate of \$90.02 per week or \$6,931.54, through February 6, 1995, followed by 55.71 weeks of permanent partial compensation at the rate of \$90.02 per week or \$5,015.01 through February 29, 1996, for a 66.67% permanent partial general disability making a total award of \$11,946.55 which is all due and owing less any amounts previously paid.

Effective March 1, 1996, claimant was entitled to a 7.5% permanent partial general disability based on functional impairment which all has been previously paid.

All other orders of the Administrative Law Judge are adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Wichita, KS
Jerry M. Ward, Great Bend, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director